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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,
v.
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondent.

No. 76-528

CONSUMERS POWER COMPANY, *Petitioner,*
v.
NELSON AESCHLIMAN, *et al.*, *Respondent.*

On Petition For Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 42, Pacific Legal Foundation hereby respectfully moves the Court for leave to file its brief *amicus curiae* bound with this motion. Consent was sought from counsel for all Respondents, one of whom responded in the negative while the remainder

failed to respond. Pacific Legal Foundation has received the written consent of counsel for Petitioners and also the Solicitor-General of the United States to file its brief *amicus curiae*. All of these documents have been filed with the Clerk.

The accompanying brief urges this Court to reverse the decisions of the Court of Appeals in *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976) and *Aeschliman* v. *Nuclear Regulatory Commission*, 547 F.2d 622 (D.C. Cir. 1976).

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation believes the action of the Court below in setting aside the Commission's [1] uranium fuel cycle rule [2] and their injection of a new pro-

[1] The term "the Commission" is used herein to refer to both the U.S. Atomic Energy Commission (AEC) and the agency that succeeded to its regulatory responsibilities on January 19, 1975, the U.S. Nuclear Regulatory Commission. 42 U.S.C. §§ 2011-2282 (1970 & Supp. V 1975); Exec. Order No. 11834, 3A C.F.R. 111 (1975), *reprinted* in 42 U.S.C. 5801 (Supp. V 1975).

[2] The "uranium fuel cycle rule" (commonly called Table S-3) was promulgated by the Atomic Energy Commission on April 22, 1974 (39 Fed. Reg. 14188) and is codified at 10 C.F.R. 51.20(e)

cedural standard into agency rulemaking proceedings will adversely affect the general welfare of the people of this nation. Further, these rulings are squarely in conflict with this Court's holdings in *Kleppe* v. *Sierra Club*, 427 U.S. 390 (1976) and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

Pacific Legal Foundation considers the decisions below to be extremely significant in that they cripple the ability of private industry to utilize nuclear power to meet the public requirements for energy. If the decisions of the Court of Appeals are allowed to stand, consequences on the public will be severe, including shortages of electricity and an escalation in consumer prices, as well as substantial and unnecessary social, economic and environmental costs.[3]

Unless these decisions are reversed the Commission and all other agencies engaged in rulemaking pursuant to 5 U.S.C. § 553 (1970) will be burdened with unreasonably vague procedural requirements which are certain to result in costly delays in such proceedings. Further, an additional burden will be placed on the federal court system as a result of litigation over the meaning

(1977). The Commission intended that, with the inclusion of environmental impacts from Table S-3, the environmental impact statements for individual light water reactors would set forth a full and candid assessment of costs and benefits consistent with the legal requirements and spirit of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* *See* 42 Fed. Reg. 13803 (March 14, 1977).

[3] *See, e.g.*, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, IMPACTS OF LATER REVERSING A DECISION TO ADOPT OR NOT TO ADOPT AN INTERIM RULE PERMITTING CONSTRUCTION OR OPERATION OF NUCLEAR POWER PLANTS, (1976); Burnett, *The Human Cost of Regulatory Delays*, 33 NUCLEAR TECH. 283 (1977).

of the new requirements developed by the Court of Appeals and injected into rulemaking proceedings by its interpretation of The National Environmental Protection Act.

The Pacific Legal Foundation, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument of the public interests at stake in this litigation.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of the *amicus curiae* is set out in the preceding motion to file this brief.

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit, *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission,* 547 F.2d 633 (D.C. Cir. 1976) concluded, *inter alia,* that the Atomic Energy Commission's rule [hereinafter "Table S-3"] codifying the environmental effects of the uranium fuel cycle for individual light-water reactors, 10 C.F.R. 51.20(e) (1977), must be set aside and remanded because the rulemaking proceedings underlying its promulgation were inadequate.

In a companion opinion, *Nelson Aeschliman* v. *United States Nuclear Regulatory Commission,* 547 F.2d 622 (D.C. Cir. 1976), the Court of Appeals incorporated by reference its decision reported at 547 F.2d 633 and remanded to the Commission its decision granting permits to construct two nuclear reactors with instructions that there be further clarification of a report of the Advisory Committee on Reactor Safety. The Commission was further instructed to consider issues relating to fuel conservation and to restrike the cost-benefit balance in view of the reconsideration of the fuel cycle and energy conservation issues.

I

THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE BEST INTERESTS OF THE AMERICAN PUBLIC

The United States is presently faced with an unprecedented energy shortage which threatens the economic and social well-being of the nation. Declining domestic production of oil, the real threat of future cut-offs of foreign supplies, and the growing realization that dwindling supplies of fossil fuels must be conserved for

future generations have forced this country into a search for safe, economical, and viable alternatives to supply energy to its homes, factories, and schools. Both Congress, in enacting the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 (1975) *et seq.*, and President Carter, in his recent proposals for a national energy policy, have recognized the importance of nuclear power as an alternative source of energy. In fact, as experts have pointed out, nuclear power is the only non-fossil energy source which is economically and technically feasible to meet this nation's immediate need for electricity. Forbes, et al., THE NUCLEAR DEBATE: A CALL TO REASON 1 (2d ed.) (1976); Nuclear Energy Policy Study Group, NUCLEAR ISSUES AND CHOICES, 109-155 (1977).

The ability of nuclear power to meet the public's growing need for electricity is amply demonstrated by its past performance and the public's reliance thereon. Nuclear powered electric generating plants in the United States accounted for about 40,000 megawatts of electric capacity (MWe), or about 8% of total national capacity in mid-1976. In early 1977, some 170,000 MWe of additional nuclear capacity was under construction or on order and scheduled to begin operation by the mid-1980's. Nuclear Energy Policy Study Group, *supra* at 5. Despite the demonstrated need for increased use of alternative power sources and the demonstrated ability of nuclear power to fill this need, proposals to build nuclear power plants are being strangled by unnecessary procedural delays. Although Congress has entrusted the responsibility for determining the safety and feasibility of nuclear energy use to the Commission, 42 U.S.C. § 2201(b), the Court of Appeals has attempted to second-guess the Commission's decision.

As Judge Skelly Wright pointed out, the result of such *post hoc* procedural requirements imposed by the courts is "to force the agencies to over-proceduralize their rulemaking deliberations . . . eliminating one of rulemaking's principal advantages over individualized proceedings: expeditious action to meet our society's needs." Wright, *Court of Appeals Review of Federal Regulatory Rulemaking,* 26 ADMIN.L.REV. 199, 207 (1974). In the case of nuclear power plants, the result has been an ever-increasing delay between the development of nuclear power proposals and the issuance of licenses to begin construction, and a similar delay between construction and final operations.

The uncertainties injected in the Commission's licensing proceedings by the Court of Appeals' decisions have already imposed a moratorium on the issuance of final construction permits and operating licenses for nuclear fuel light water reactors. See Pet. No. 76-419, Petitioner's Supplemental Brief and Supplemental Appendix, at 5-8. These procedural delays have contributed substantially to decisions by private utilities to abandon nuclear powered electrical generating facilities and resulted in substantial cost being incurred by the public.[1] Delays in licensing procedures and abandonment of planned facilities not only entail substantial economic loss but will also result in significant health and environmental costs. *See* note 3 *supra.* The economic losses are inevitably passed on to the utilities' investors and

[1] See, *e.g. Nucleonics Week,* March 24, 1977, at 6 (". . . FP&L has just canceled two 1,160-MW nuclear units after a $20 million investment 'out of frustration with the licensing process and escalating costs' "); *Washington Post,* March 17, 1977, at E1, col. 1, ("Customers of the Virginia Electric and Power Co. may lose as much as $146 million if the company cancels construction of two reactor units at its Surry nuclear power plant. . . .").

consumers, while the environmental and health costs are borne by all.

With full knowledge of the risks inherent in the continued use of nuclear energy, Congress and the Commission have determined that the benefits to the public outweigh the risks to the public. This determination by Congress and the Commission should not be overturned lightly by the courts. The vague procedural requirements of the Court of Appeals improperly permit mere argument alone "against the principled judgment of agencies charged with the protection of the public interest to bring essential economic development to a standstill by magnification of slight possibilities into the horror of impending doom." *Citizens for Safe Power* v. *Nuclear Regulatory Commission,* 524 F.2d 1291, 1301 n.15 (D.C. Cir. 1975).

In addition, the vagueness of the additional procedural requirements imposed by the Court of Appeals under the rubric of "hybrid" proceedings will certainly lead to additional dilatory litigation. This litigation will impose an additional burden on an already over-burdened judicial system, at substantial cost to the public. Indeed, additional litigation on similar issues is now burdening the court system.

The Commission, in an attempt to avoid the unnecessary costs of the hiatus in its licensing functions occasioned by the decisions of the Court of Appeals, promulgated a "final interim rule" intended to replace Table S-3 until such time as an acceptable final rule could be promulgated, or eighteen months, whichever occurs first. 42 Fed. Reg. 13803 (March 14, 1977). Despite the extensive documentary support for this interim rule, and the more than adequate notice and com-

ment period preceeding its promulgation, Natural Resources Defense Council has petitioned the United States Court of Appeals for the District of Columbia for review of this interim rule. *Natural Resources Defense Council* v. *Nuclear Regulatory Commission,* No. 77-1448 (D.C. Cir., filed May 13, 1977). While the action of the Court of Appeals in response to this petition is not to be presumed, there is a significant possibility that it may vacate the Commission's interim rule resulting in an absolute prohibition on licensing. Thus unless this Court act expeditiously to reverse the decisions of the Court of Appeals, the American public may be unnecessarily deprived of the beneficial use of nuclear energy for a long time to come.

II

THE COURT OF APPEALS HAS DEVISED A NOVEL AND INAPPLICABLE STANDARD OF REVIEW OF THE RULEMAKING PROCEDURES OF THE NUCLEAR REGULATORY COMMISSION

A

Mandate and Function of the Nuclear Regulatory Commission

Congress, by enacting the Atomic Energy Act of 1954 (AEA), 42 U.S.C. § 2011 *et seq.* (1970), entrusted the regulation and control of the peaceful uses of nuclear energy to the Atomic Energy Commission (the Commission).[2] In so doing Congress created a "regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel* v. *AEC,* 400 F.2d. 778, 783 (D.C. Cir.

[2] *See,* note 1, Motion for Leave to File Brief; *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers,* 367 U.S. 396, 404 (1961).

1968). The Commission is authorized to prescribe such regulations or orders as it deems necessary to protect the public health and minimize danger to life or property, and make such other rules and regulations as are necessary to carry out the purposes of the AEA.[3]

B

The Commission's Promulgation of Table S-3 Was In Total Compliance With the Informal Rulemaking Provisions of Both the AEA and APA

As the Court of Appeals properly recognized, when promulgating Table S-3 the Commission was engaged in a rulemaking proceeding pursuant to the AEA and Administrative Procedure Act (APA),[4] 5 U.S.C. § 500, *et seq.* Section 181 of the AEA, 48 U.S.C. § 2231 (1970), makes the provisions of the APA applicable to all Commission administrative actions. *Siegel,* 400 F.2d at 785. The minimum requirements of a rulemaking proceeding governed by the provisions of the APA, 5 U.S.C. § 553, are,

> . . . that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. (footnote omitted) *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 758 (1972).

While Section 189(a) of the AEA, 42 U.S.C. § 2239 (a) (1970), provides interested parties the right to a

[3] Atomic Energy Act of 1954, § 161, 42 U.S.C. § 2201 (1970).

[4] *Natural Resources Defense Council,* 547 F.2d at 637-638.

hearing in such rulemaking proceedings, neither the APA nor the Commission's rules, 10 C.F.R. § 2.805 (1977), require an evidentiary hearing. *Nader* v. *Nuclear Regulatory Commission,* 513 F.2d 1045, 1051 (D.C. Cir. 1975); *Siegel,* 400 F.2d at 785. Indeed the right to participate in a hearing before the Commission "does not necessarily embrace either the right to present evidence orally and to cross examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker." *United States* v. *Florida East Coast Railway,* 410 U.S. 224, 240 (1973). Nor is the Commission required to hold a hearing on the record when engaged in informal rulemaking. *Allegheny-Ludlum Steel Corp.,* 406 U.S. at 756; *Siegel,* 400 F.2d at 785-86.

When the Commission issued Table S-3, 10 C.F.R. 51.20(e) (1977), it had fully complied with the requirements of all applicable statutes. However, the Commission went far beyond the "bare minima."

The Commission's decision was based on a 260 page, single spaced "Final Environmental Survey of the Nuclear Fuel Cycle" published by the AEC's Directorate of Licensing;[5] written comments of 46 participants[6] and the Regulatory staff; a 520 page transcript of oral proceedings on the subject;[7] all documents referenced in the foregoing submissions; a report of a three member hearing board;[8] and lastly, the lengthy Statement

[5] Environmental Survey of the Uranium Fuel Cycle, WASH-1428, 39 Fed. Reg. 14188 (April 16, 1974).

[6] Written comments were received in response to notice in the Federal Register, 38 Fed. Reg. 49 (Jan. 14, 1973).

[7] Uranium Fuel Cycle, U.S. AEC Docket No. RM-50-3 (January 17, 1973 and February 1 and 2, 1973).

[8] The Board was appointed by notice at 38 Fed. Reg. 49 (January 14, 1973).

of Consideration issued by the Commission with the final rule.[9] The Commission's final conclusions were properly based on a full rulemaking docket and its own expertise. As such they should be sustained. *Ethyl Corp.* v. *EPA,* 541 F.2d 1 (D.C. Cir.) (*en banc*), *cert. denied* 96 S.Ct. 2663 (1976); *Siegel,* 400 F.2d at 786 (quoting *California Citizen's Band Association* v. *United States,* 375 F.2d 43, 54 (9th Cir.) *cert. denied,* 389 U.S. 844 (1967)).

In light of the substantial administrative record, reflecting extensive public input and consideration of the available relevant technical information prior to its promulgation of Table S-3, the Commission's action was a proper one, and should be fully sustained. *Ethyl Corp.,* 514 F.2d at 33-38.

C

The Court of Appeals Improperly Disregarded the Distinction Between Informal Rulemaking Procedures and Formal Adjudicatory Procedures

Although the AEA does not require a formal hearing, the Commission has interpreted 43 U.S.C. § 2239 (1970) to require informal notice and comment hearings for rulemaking proceedings and formal on-the-record hearings for licensing proceedings. *Siegel,* 400 F.2d at 785.

This distinction has consistently been upheld and found to be important to maintain the necessary flexibility for the agency in selecting the appropriate hearing procedure. *Id.* at 786.

[9] 39 Fed. Reg. 14188 (April 16, 1974). The Commission also indicated that the rule and the data on which it was based would be re-examined from time to time to accommodate new information.

The primary purpose of the APA, as established by this Court, was to "introduce greater uniformity of procedure and standardization of administrative practice . . . ." *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 41 (1950). The Court of Appeals, in expanding the APA requirements, improperly circumvented this stated purpose.

Further the Court of Appeals ignored this Court's admonition that "[w]hile the line dividing them may not always be a bright one, [there is] . . . a *recognized dictinction* in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *Florida East Coast Railway,* 410 U.S. at 245 (emphasis added). This Court has stressed that reviewing courts must be alert to the differing standards governing review of an agency's rulemaking authority and its adjudicatory function. *Allegheny-Ludlum Steel Corp.,* 406 U.S. at 749. If this distinction is not maintained and courts create *ad hoc* procedures going beyond the requirements of the APA, "opportunities for caprice and utter unpredictability" will abound. Indeed,

> [I]nsisting on such procedures after the fact, without either constitutional or solid statutory warrant, [is] . . . a kind of *ad hoc* second guessing that can only demoralize conscientious agency officials and undermine the reliability of agency judgments. . . .
>
> So long as the question of whether oral hearings, cross examination, or use of specific interrogatories depends on judges' *post hoc* custom-made notions of "fairness" or "importance," judicial review will seem merely a game of Russian roulette in the Courts of Appeals.

Wright, *Court of Appeals Review of Federal Regulatory Rulemaking,* 26 ADMIN.L.REV. 199 (1974).

The present paralysis in the Commission's regulatory functioning resulting from the Court of Appeals' decisions is a glaring example of the detrimental effects of judicial "*ad hoc* second guessing."

III

THE COURT OF APPEALS INCORRECTLY USED NEPA TO IMPOSE NOVEL AND UNWORKABLE PROCEDURAL REQUIREMENTS ON AGENCY RULEMAKING

In *Natural Resources Defense Council* v. *Nuclear Regulatory Commission,* the Court of Appeals justified its requirements for a "hybrid" proceeding by reference to the "statutory context created by NEPA." 547 F.2d at 645. However, while NEPA requires that an agency consider environmental factors before reaching its decision, it does not stipulate what procedures or format must be used to obtain the necessary input. Environmental factors are but one consideration that an agency such as the Commission is required to assess and weigh objectively in determining the public convenience and necessity. *See Aberdeen & Rockfish Railroad Co.* v. *SCRAP,* 422 U.S. 289, (1975). In addition this Court has recently held that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Flint Ridge Development Co.* v. *Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 788 (1976).

In evaluating the Commission's actions under NEPA, "[t]he only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion

of the executive as to the choice of the action to be taken.'" *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (quoting *National Resources Defense Counsel* v. *Morton*, 48 F.2d 827, 838 (D.C. Cir. 1972)).

Just as the courts cannot impose "court devised factors" to dictate the scope and timing of an environmental impact statement, *id.* at 406, neither can the courts devise additional requirements for administrative rulemaking, so long as the agency has complied with the requirements of its governing statutes and the APA. "Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation." *Id.* The Court of Appeals' use of judicial hindsight to impose vague overbroad requirements on the Commission's rulemaking proceedingse leaves little hope that such proceedings can ever be consumated in an order that would not be subject to reopening. *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515 (1944).

The danger of such judicial conduct is particularly acute because of the Court of Appeals' broad interpretation of the substantive requirements of NEPA. In *Aeschliman*, for example, the court rejects the "rule of reason" and requires the Commission to undertake an investigation of a "colorable alternative" brought to its attention by an intervenor's comments on a draft environmental impact statement. 547 F.2d at 628. This requirement would reduce the Commission's licensing proceedings to an exercise in mental gymnastics limited only by the scope of the commentor's imagination.

Moreover, it is contrary to well settled limitations on an agency's duty to consider alternatives to its actions. "The requirement is not to explore every extreme possibility which might be conjectured. Rather, . . . NEPA's requirement [is] one of considering alternatives *as they exist and are likely to exist.*" *Carolina Environmental Study Group* v. *United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) (emphasis added). *See also Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 834, 837-38 (D.C. Cir. 1972) ("rule of reason" requires that alternatives must be reasonably available).

IV

AGENCY ACTION IS PRESUMED VALID UNLESS FOUND TO BE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION OR OTHERWISE NOT IN ACCORDANCE WITH LAW

Where Congress has entrusted the regulation of a given activity to a regulatory agency "[the agency] must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). In this regard, the Commission is expressly granted substantial discretion as to how it will proceed. 42 U.S.C. § 2339(a) (1970)[10]. A reviewing court may only set aside agency action when its findings and conclusions are clearly found to be arbitrary, capricious, an abuse of discretion or not otherwise in accordance with law. Barring this, the agency's action is presumed valid and a court may

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[10] Even the Court of Appeals has recognized this discretion and the desirability of this rule in previous decisions. *See, e.g., Ethyl Corp.* v. *EPA*, 541 F.2d 1, 24-27; *Seigel*, 400 F.2d at 786.

not substitute its judgment for the agency. *See Ethyl Corp.* v. *EPA,* 541 F.2d 1, 33-38 (D.C. Cir. 1976) (and cases cited therein).

In making its review of the Commission's decision, the reviewing court must apply a three fold test: (1) whether in light of the relevant facts and of the Commission's broad regulatory duties, the agency abused or exceeded its authority; (2) whether the essential elements of each commission order are supported by substantial evidence; and (3) whether the Commission's orders may be reasonably expected to implement Congressional intent and protect both the existing and forseeable public interests. *Permian Basin Area Rate Cases,* 390 U.S. 747, 791-792 (1968). The Court cannot reweigh the evidence introduced before the Commission nor broaden its scope of review as to the wisdom of the regulations. *Allegheny-Ludlum Steel,* 406 U.S. at 742. Furthermore, it cannot supplant the Commission's balance of public interests with one more nearly to its liking, *Permian Basin Area Rate Cases,* 390 U.S. at 798. Finally, "[t]he focal point for judicial review should be the administrative record already in existence . . . ." *FPC* v. *Transcontinental Pipe Line Corp.,* 423 U.S. 326 (1976).

Yet, in *Natural Resources Defense Council,* the decision of the Court of Appeals was grounded substantially on its own refusal to accept the testimony of Dr. Frank K. Pittman, a witness in the proceedings for the Nuclear Regulatory Commission. Dr. Pittman stated that radioactive wastes could be managed without unreasonable risk to public health and safety. *See* 547 F.2d at 647-653. The court based much of its rejection of the Pittman testimony on articles published after Table S-3 was promulgated without affording Dr. Pittman or any other party an opportunity to respond to these materials. In addition, the Court of Appeals incorrectly concluded that the Commission "uncritically relied on . . . assurances by agency personnel that problems as yet unsolved would be solved." 547 F.2d at 653.

Such statements by the Court of Appeals indicate that it was engaged in a sifting and weighing of the evidence: a substitution of its own judgment for that of the agency's judgment.

Moreover, in relying upon materials published after the development of the administrative record, the Court of Appeals essentially manufactured a new administrative record. Review of administrative decisions is to be confined to "consideration of the decisions of the agency . . . and of evidence upon which it was based." *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709, 714-715 (1963), quoted in *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326, 331 (1976). "[T]he focal point of judicial review should be the administrative record already in existence, not some new record initially made in the reviewing court." *Camp* v. *Pitts,* 411 U.S. 138, 142 (1973).

V

CONCLUSION

By any legal yardstick, the Commission fully complied with both the requirements of the APA and the AEA. In addition, the Commission provided additional procedural safeguards by allowing adequate public input and discussion of issues prior to promulgating Table S-3.

Yet the Court of Appeals has fashioned an infinitely malleable standard of judicial review which will allow a reviewing court to pick and choose at random from the administrative record, or manufacture a new record, to impose its preferences upon the Commission. What both decisions have done is to remove constraints from the scope of judicial review, and permit the court to forage among the administrative records until it finds sustenance for its own predilections. Such a rule works havoc upon the orderly, predictable administrative process; it spawns endless procedural opportunities for litigation, dilatory challenges to agency action.

Set in the context of a severe energy shortage facing the nation, the Appellate Court's decisions seriously freeze the development of an essential energy source and can only aggravate the national energy crisis. This court is urged to affirm the correctness of the agency's decisions and reaffirm the limitations of judicial review of agency actions. In so doing, this Court will cut the legal red tape which threatens to strangle the development of nuclear power as a national energy source.

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